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**House Homeland Security Committee**  
**Subcommittee on Management, Integration, and Oversight**  
**Written Testimony on CBP and ICE**  
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Chairman Rogers, Ranking Member Meek, and Members of the Subcommittee:

Thank you for inviting me to testify here today on the important topic of whether the two sister agencies of the Department of Homeland Security (DHS) focused on securing our borders and enforcing our immigration and customs laws – U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) – should be consolidated into a single border, immigration, and customs enforcement agency within DHS.

I am currently a lawyer in private practice at Akin Gump Strauss Hauer & Feld LLP in Los Angeles, but prior to that, I served in the Department of Homeland Security as the Director of Policy and Planning at U.S. Customs and Border Protection, as well as Counselor/Senior Policy Advisor to then Commissioner Robert C. Bonner. I served in a similar position with Commissioner Bonner at the U.S. Customs Service, prior to the creation of DHS and CBP. Since leaving government, I have remained active in the homeland security policy arena through work with the Center for Strategic and International Studies (CSIS), the George Washington University Homeland Security Policy Institute (HSPI), and other activity. Of most relevance to this hearing, I served on the CSIS-Heritage Foundation Task Force that drafted the “DHS 2.0” report, recommending a significant reorganization of DHS. In his Second Stage Review (2SR), Secretary Chertoff accepted many of the organizational recommendations of the “DHS 2.0” report. One “DHS 2.0” recommendation *not* adopted by Secretary, however, was our recommendation that CBP and ICE be merged into a single agency devoted to securing our borders, and enforcing our immigration and customs laws.

I continue to stand by the recommendation made by the “DHS 2.0” report. In my view, the split of CBP and ICE was a mistake that, in the supposed interests of breaking down the stovepipes and duplications that made the relationship between the two pre-DHS border agencies -- INS and Customs -- so dysfunctional, created new ones that did not exist before and never needed to exist. We now have -- yet again -- two border agencies, and have -- yet again -- stovepiped and fragmented the interrelated pieces of border, immigration, and customs enforcement into two competing and turf protective agencies. While DHS, CBP, and ICE have certainly made significant progress in better securing our borders and enforcing our immigration and customs laws, I believe the current organizational structure interferes with DHS from accomplishing all that it could in this area.

How did we get here? Honestly, I have no idea. Literally since the Hoover Administration, experts had produced numerous reports arguing that the separation of the twin border functions of immigration and customs into two separate agencies – INS and Customs – in two separate cabinet departments – Justice and Treasury – had led to needless dysfunction, duplication, and turf warfare. The examples of this are well worn, but a few are worth repeating – the separate and duplicate management structures for the immigration and customs inspectors working side-by-side at our ports of entry, the stories of Border Patrol Agents and Customs Special Agents

drawing guns on each other on conflicting and uncoordinated enforcement operations, the separate INS and Customs air forces both performing border enforcement functions but not coordinating, among other choice tales. Over the years, the government had missed various opportunities to fix this problem, coming closest in 1973, when the merger of customs and immigration was proposed and some Customs Special Agents were split off as part of the creation of the Drug Enforcement Administration (DEA).

With the creation of DHS and the public momentum behind strengthening our border security post 9/11, the golden opportunity finally arose to make this “good government” reform and consolidate our border security, immigration, and customs enforcement agencies. At the same time, the creation of DHS presented the opportunity to make good on a Presidential promise to split the services functions of the old INS away from the enforcement side, to create a separate agency devoted to citizenship and immigration services.

Unfortunately, in making this “good government” reform, we bobbled the ball. Instead of doing the simple thing and simply consolidating the U.S. Customs Service with the enforcement side of the INS, we embraced complexity and made our lives more difficult. Violating the so-called “KISS” principle, we decided to consolidate border, immigration, and customs issues by *fragmenting* responsibility and accountability for them into not two but now *three* agencies – CBP, ICE, and CIS.

Fixing the previous “horizontal” customs versus immigration split, we created a new “vertical” fragmentation – separating the patrol and interdiction functions of border, immigration, and customs enforcement from the investigation and alien processing functions. So, in other words, we decided to simultaneously conduct a “divorce” by breaking up Customs and INS, as well as conduct a merger by re-combining the shards of these former agencies into CBP and ICE, and integrating legacy customs, immigration, and agriculture enforcement operations into not one but *two* agencies.

For good measure, we also complicated the border intelligence functions, international operations, mission support, and integrity functions – splitting them haphazardly and painfully between CBP and ICE. (Indeed, for a time, even the air and marine interdiction operations were split between CBP and ICE, with the legacy Border Patrol assets going to CBP and the legacy Customs assets going to ICE, with little operational coordination – even though both had overlapping border interdiction missions. Thankfully, after more than a year of considering this elementary problem, DHS consolidated these functions and assets into one of the border agencies, CBP.)

This “divorce” process of splitting up Customs and INS and recombining them into CBP and ICE took countless hours of DHS, CBP, and ICE management time, over a year of acrimonious “divorce” negotiations over which agency gets what, complicated processes of splitting up budgets, wrenching change as legacy Customs Special Agents were forced to adopt legacy INS systems and vice versa, and the creation of duplicate mission support bureaucracies. In short, the splitting of INS and Customs and their recombination into CBP, ICE, and CIS created no end of management headache, and greatly complicated the first years of DHS – including the process of merging legacy immigration, customs, and agriculture enforcement functions into cohesive operational units within what became CBP and ICE.

And to what end? Still, no one is quite sure. It is telling that last year's DHS Inspector General report on whether CBP and ICE should be merged noted that the rationale for splitting the border agencies in the first place was "difficult to discern." Indeed, just as it would be "difficult to discern" a rationale for splitting the New York Police Department into a "Patrol Bureau" and a "Detectives Bureau" with overlapping and inextricably interdependent responsibilities for the same crimes but different management structures and chains of command, it is also "difficult to discern" why we would split overlapping and inextricably interrelated border, immigration, and customs enforcement responsibilities into a "Border, Immigration, and Customs Interdiction, Patrol, and Enforcement Bureau" and a "Border, Immigration, and Customs Investigations, Detention and Removal, and Student Visa Processing Enforcement, Among Other Things, Bureau."

The *problems* with such a split of overlapping border, immigration, and customs enforcement responsibilities are well documented and don't require large-scale rehashing here. The "divorce year" problems of 2003-2004, discussed previously, are "water over the dam" – those countless hours of DHS management time (and accompanying distractions from work on the substantive homeland security mission) figuring out how to split up Customs and INS (including their assets, budgets, missions, legal jurisdictions, and personnel) and recombine them into CBP, ICE, and CIS cannot be retrieved. But the operational and practical problems continue. In summary form (again, avoiding rehashing well-trod ground), they include:

- 1. *The fragmentation of inextricably interrelated border, immigration, and customs interdiction and patrol functions from border, immigration, and customs investigations.*** *Just as NYPD detectives depend on leads from NYPD patrol cops, many (if not most) border, immigration, and customs enforcement investigations start with an interdiction, an arrest by a Border Patrol Agent or Inspector, or some other similar lead from the frontline. And, conversely, effective interdiction efforts depend on the intelligence and targeting information drawn from those investigations. This is the "feedback loop" that, over the decades, has been such a critical feature of effective border, immigration, and customs enforcement. This is true, even with regard to so-called "interior" immigration enforcement – given that all illegal migrants had a path here that led through a border or port of entry and many got here with the help of an alien smuggling organization that delivered them across the border. Given this, why would one put these inextricably interrelated functions into two different agencies, with different operational, budgetary, enforcement, and policy priorities, and with only a thin layer of Department-level (i.e., not field level) coordination? Last year's Inspector General report documents the predictable result of this split, with numerous anecdotes of missed handoffs, turf warfare, and a general lack of coordination in the field and at headquarters.*
- 2. *The split of border and immigration apprehensions from alien detention and removal functions.*** *By most estimates, approximately 90% of the aliens detained and removed by the legacy INS Office of Detention and Removal Operations are apprehended by the Border Patrol and frontline inspectors at the Ports of Entry. Given this, why would one put the apprehensions side of border/immigration enforcement in one agency with one set of policy, budgetary, and enforcement priorities, while putting the detention/removal side of border/immigration enforcement in another one with different such priorities, again with only a thin layer of Department-level (i.e., not field level) coordination? Last year's*

*Inspector General report documents the predictable result of this split, in terms of mismatches of resources and priorities – the quintessential example being the OTM release issue.*

- 3. **The division of intelligence functions.** It goes without saying that both border/immigration/customs investigators and border/immigration/customs patrol and inspections officers need intelligence concerning potential border, immigration, and customs violations. And, given the “feedback loop” discussed previously, it would be ideal for that intelligence resource to be common to both the patrol/inspections side and the investigations side of border/immigration/customs enforcement. Given this, why would one break the intelligence function into two pieces and put the fragments into two separate agencies?*
- 4. **The division of international operations.** By definition, border, immigration, and customs enforcement has an international dimension. On the interdiction side, this is demonstrated by the Container Security Initiative (CSI), pre-clearance operations in Canada, the CBP deployments at Schipol Airport in Amsterdam, and Border Patrol efforts with Mexico, among other things. On the investigations side, all border smuggling investigations by definition have an international component. In the legacy Customs Service, the foreign “attaché” corps served both the interdiction and investigations sides of the house – coordinating foreign smuggling investigations and negotiating the CSI agreements with foreign governments. With the split of CBP and ICE, however, the legacy Customs attaches (all of whom were Special Agent investigators by background) were transferred to ICE, leaving the CBP operators overseas – including the CSI teams operating in 42 ports around the world – without effective representation at the U.S. Embassies. CBP is now having to rebuild its attaché corps, now with attaches in Mexico City and Ottawa.*
- 5. **The split effectively destroyed the legacy Customs Internal Affairs Office.** One unintended by-product of the split was the destruction of the legacy Customs Office of Internal Affairs – which, when it was re-tooled in the late 1990s, dramatically reduced the serious corruption problems that had plagued Customs. This successful program was split along with CBP and ICE, and fundamentally was destroyed – for little reason.*

These are just an assortment of the areas in which the dismantling of INS and Customs and their re-combination into CBP and ICE caused predictable problems, waste, and dysfunction. Adding these points to the hours of DHS, CBP, and ICE management time wasted managing the “divorce” of the agencies in 2003-2004 – rather than focusing on substantive homeland security issues – places a heavy burden of proof upon those who contend the split was in fact a good idea. Given that even the Inspector General found the rationale for the split and all of its disruptions to be “difficult to discern,” it is hard to see how split proponents can justify why they made such a disruptive and destructive decision.

Concluding that the original split of INS and Customs and their reconstitution into CBP and ICE was a mistake does not answer the question posed by this Committee, however. The reality is that the split has happened, and CBP and ICE currently exist. The question now becomes whether it is worth the effort to undo the organizational mistake made a few years ago.

The Department of Homeland Security has clearly concluded that it is not. Tellingly, DHS does not defend the original decision to split Customs and INS and re-combine them into CBP and

ICE. Deputy Secretary Jackson's letter responding to the Inspector General's report of last year does not defend the original decision. Nor did Assistant Secretary Baker's testimony of last year. Rather, the apparent DHS rationale for not merging CBP and ICE appears to be that it is too late to unbreak the eggs and that the omelet has already been made. In Deputy Secretary Jackson's words, a merger of CBP and ICE would "yield a protracted period of organizational churn, thus undermining operational effectiveness at CBP, ICE, and the Department at large."

I can certainly sympathize with Deputy Secretary Jackson's comment. I lived through the first period of "organizational churn" when DHS made the decision to break up Customs and INS and re-combine them into CBP and ICE.

And it may indeed be true that the benefits associated with creating a single border, immigration, and enforcement agency might not be worth the "organizational churn" associated with combining two currently existing agencies, CBP and ICE. In some sense, DHS might simply have "bigger fish to fry," as it works on strengthening FEMA, addresses port security issues, and endeavors to strengthen border and immigration enforcement through the Secure Border Initiative, among other things. It may be that the window for organizational tinkering has closed – even to correct obvious mistakes, such as the CBP-ICE split – and it is time to focus on the substance of homeland security and strengthening obvious organizational basket-cases like FEMA. In the meantime, DHS can muddle through with the dysfunctions of having CBP and ICE be separate agencies through coordination mechanisms and a stronger policy apparatus. And we must give significant credit to Secretary Chertoff, Deputy Secretary Jackson, and to the leaders of ICE and CBP for all the great strides they have made.

Maybe at this point it is better to leave well enough alone, and let DHS do its substantive work without the distractions involved with further organizational change.

I don't think so, however. In fact, I think now is exactly the time to correct the mistake, merge CBP and ICE, and fulfill the longstanding goal of establishing a single border, immigration, and customs enforcement agency. The reality is that the longer we wait to correct this mistake, the more entrenched the CBP and ICE bureaucracies will become, and the more painful it will be to create a single agency. As we discussed in the "DHS 2.0" report, this is the lesson of the Department of Defense. DoD muddled through and bowed to service parochialism for almost 40 years from 1947 to Goldwater-Nichols in 1986, when it finally reorganized the armed forces to make our military more effective.

The lesson of DoD is clear. Fix organizational problems at the beginning, or conceivably be doomed to live with them for decades – as with each year, the change becomes harder and harder to accomplish and the transaction costs rise. The reality is that DHS is still young, and the cement within the Department is not yet dry. The War on Terror will be with us for decades, and DHS will be with us for far longer. DHS needs to be organized for the long term, and not simply in order to avoid the costs associated with correcting dysfunctional organizational structures – especially if those dysfunctions were self-inflicted.

Moreover, the "organizational churn" associated with merging CBP and ICE – while not insignificant, surely – would not nearly rise to the level of "organizational churn" that accompanied the original decision in 2003 to shatter Customs and INS and re-constitute them as CBP and ICE. Indeed, much of the "organizational churn" in 2003 and 2004 had to do with the

“divorce” proceedings associated with the dismantling of INS and Customs – the “who gets what,” and how to split up and re-constitute mission support bureaucracies. A CBP-ICE merger would not have any of those complications or traumas. Indeed, a CBP-ICE merger would simply add additional direct reports to the head of the consolidated border/immigration/customs enforcement agency – as all the interrelated operational elements of border, immigration, enforcement elements (i.e., investigations, intelligence, patrol, inspections, detention/removal, air/marine operations, and international affairs) would all be under one roof and under one operational chain of command. This “churn” would be far more manageable than the miserable “churn” that associated the initial mistaken decision to dismantle existing agencies.

Furthermore, much of the pain associated with the “merger” piece of creating CBP and ICE – as opposed to the “divorce” associated with dismantling Customs and INS – primarily arose out of the need to integrate legacy customs, immigration, and agriculture functions into single operational chains of command. This has now been done. CBP has created “Once Face at the Border,” as legacy immigration, customs, and agriculture inspectors have all be integrated into a single CBP inspectional force. ICE has integrated legacy customs and immigration Special Agents into a single Office of Investigations. Many other integrations have been accomplished by the ICE and CBP leadership. In merging CBP and ICE, this integration of legacy functions would not need to be done again. Instead, the integrated Office of Investigations would simply co-exist with the integrated Office of Field Operations in a unified border, immigration, and customs enforcement agency, under a single chain of command to the agency head.

In addition, bringing CBP and ICE together under one agency head would simplify the Departmental task – as DHS leaders would no longer need to waste their time “coordinating” the obviously interrelated operational functions of border, immigration, and customs enforcement. An operational agency head would do this, assisted by a firm chain of command down to the field, and that operational agency head would be held accountable for failure by the President and the Secretary. DHS would no longer need to mediate disputes between CBP and ICE on mission support or budget issues. An agency head would deal with these issues for the unitary border, immigration, and customs enforcement agency – and the President and the Secretary would hold him or her accountable for failure. The DHS leadership has far better things to do than baby-sit the two often warring border, immigration, and customs enforcement agencies.

In short, the merger of CBP and ICE would bring significant benefits, and achieve a long-sought reform – creating a single border, immigration, and customs enforcement agency. And the costs in “organizational churn” identified by DHS are greatly overstated and, in any event, will be inevitable whenever CBP and ICE are ultimately merged. In short, this is a good government reform and there is no time like the present.

Thank you again, Mr. Chairman, Ranking Member Meek, and members of the Subcommittee for holding this hearing and inviting me to participate. I look forward to answering any questions you might have.